SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 5 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1046

E. T. BARWICK and E. T. BARWICK MILLS, INC.,
Petitioners,

against

T. C. V'SOSKE, S. T. V'SOSKE, K. A. V'SOSKE,
GEORGE A. SPATER and V'SOSKE SHOPS, INC.,
Respondents.

REPLY BRIEF FOR PETITIONERS

RICHARD JOYCE SMITH,
Counsel for Petitioners.

PATRICK H. SULLIVAN,
FORBES D. SHAW,
JOHN V. THORNTON,
T. DAVID MULLEN,

WHITMAN, RANSOM & COULSON
Of Counsel.

March 4, 1969

IN THE

Supreme Court of the United States

October Term, 1968

No. 1046

E. T. Barwick and E. T. Barwick Mills, Inc.,
Petitioners,

against

T. C. V'Soske, S. T. V'Soske, K. A. V'Soske,
George A. Spater and V'Soske Shops, Inc.,
Respondents.

REPLY BRIEF FOR PETITIONERS

As to the Failure to Apply Rule 52(a)

Respondents do not dispute that the crucial issue in this case as it came before the Court of Appeals was one of fact, not of law. Nor do respondents deny that the Court failed to apply Rule 52(a) in resolving that issue. They say, however, that the Court applied "an even sterner test than that contemplated by Rule 52(a)". (p. 12)*

Respondents' argument rests on the premise that, since the Court of Appeals found "no evidence" to overcome

---

* All page references are to the Brief for Respondents in opposition, unless otherwise noted.

what it felt was "the reasonable inference" from the correspondence that the parties did intend to be bound in the absence of a formal contract, this "constitutes a holding that the finding of the District Court [that they did not so intend] was clearly erroneous". (pp. 12, 13)

Respondent's argument is completely question-begging. It assumes from the Court's holding that it applied the proper standard of review, whereas it was the Court's failure to apply Rule 52(a) that enabled the Court to hold as it did.

If Rule 52(a) had been applied—rather than the different standard suggested by respondents—the findings of the District Court would have been presumptively binding on appeal and the burden would have been on respondents, who were attacking the findings, to show they were "clearly erroneous". Nothing can be clearer than that the findings by the District Court were not so treated.

Contrary to the Rule, the Court of Appeals made its own "independent review of the evidence", drew its own inferences from correspondence which was—at the least—susceptible to different interpretations, and required petitioners to "overcome" these inferences. (A 8)* By this device the Court shifted to petitioners the burden of showing that the "correspondence was to be of no legal effect" when the District Court had found that the evidence was "abundantly clear", "overwhelming" and "plain" that the parties did not intend to be bound by such correspondence. (A 8*, A 14)

In support of their argument that petitioner Barwick did not intend that a formal contract be executed before the parties were bound, respondents lift one question out of the entire record, wholly out of context. (p. 13) It is clear

---

* *V'Soske* v. *Barwick*, 404 F. 2d 495, 499.

that what Mr. Barwick was saying was that he had left to his vice president, Mr. Kellar, and his counsel, Mr. Smith the question of the details as to how and when the parties would be bound. As the District Court put it, he "had delegated to them the authority and task of negotiating and formulating the final terms of a written contract." (A 14) And these two men testified unequivocally that there never was a contract. This testimony was so critical, that the Court directed the following questions to Mr. Kellar:

> "The Court: What did you say, what was said when Mr. Warner said 'You must understand we haven't got a deal here until'—I forget what he said. What did he say?
>
> "The Witness: He said, 'You must understand there is no contract, that there can be no contract until the liquidation—after the liquidation of the corporation, and if an occasion arises in the future you must be prepared to swear to this.'
>
> "[412] The Court: What did you say? What was said on your side of the subject? Who said it and what was said?
>
> "The Witness: Well, Mr. Smith and I acquiesced because *we didn't feel we had any contract at all.*
>
> "The Court: What did you say?
>
> "The Witness: I wouldn't remember.
>
> "The Court: Did you say okay?
>
> "The Witness: Yes. We agreed to it, yes sir." (JA 270a-271a) (Italics supplied)*

Respondents' attempt to argue that the Court of Appeals did not pass on the credibility of testimony in violation of Rule 52(a) ignores the indisputable fact that the Dis-

---

* Mr. Smith similarly testified "I did definitely agree with you (referring to Mr. Warner) that there was no binding agreement and that I was prepared to so testify if it ever became material in any tax controversy." (JA 238a).

trict Court believed and accepted Mr. Kellar and Mr. Smith's testimony (p. 3, *supra*)—not as evidence of rescission—but as further evidence that both parties understood there was to be no binding agreement until the execution of a formal writing. The District Court said:

> "Rather, I think the testimony on that subject points *once again* to the fact that . . . *the parties* did not intend to be bound until execution and delivery of a formal contract". (A 16) (Italics supplied)

As to the Failure to Apply New York Law Concerning Subsequent Negotiations

Respondents do not dispute *Boysen* v. *Van Dorn Iron Works Co.*, 94 App. Div. 95 (4th Dep't N. Y. 1904) and other authorities holding that subsequent negotiations by both parties defeat any preliminary understanding. Instead they attempt to bring this case within *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209 (1894), where only the party disclaiming the contract sought to add new terms. They argue it was petitioner Barwick who "subsequently sought to amend the agreement to include new terms and that the V'Soskes made counter-suggestions with respect to such new terms . . ." (p. 14)

Even if the New York cases permitted such a nice distinction as the one respondents would draw between "new terms" and "counter-suggestions"—and they do not—the evidence is clear that it was respondent's counsel, Mr. Warner, who in telephone conversations subsequent to the correspondence,* first demanded a mortgage or other security for the deferred balance of the purchase price and a $30,000 unaccounted for expense account for Mr. V'Soske. (JA 217a-218a) It was Mr. V'Soske's insistence on this latter point, which was never settled, that caused negotiations to falter. (JA 78a, 251a) These demands, to mention

---

* These telephone conversations are conveniently omitted from respondents' statement of facts.

two examples, were not, to borrow respondents' lexicon, "counter-suggestions" to any proposal of petitioner Barwick.

The fact that both parties sought to amend the understanding to include new terms distinguishes the instant case from *Saunders* v. *Pottlitzer, supra,* for the reasons stated in *Boysen* v. *Van Dorn Iron Works* (94 App. Div. at 99):

> "* * * The distinction is that both parties in this action sought to modify materially the original understanding, and each in effect recognized the right to make alterations in its terms before it became a consummated agreement."

As to the Failure to Apply New York Law Concerning the Statute of Frauds

Respondents argue that the requirement of the Statute of Frauds that the parties be identified is met because, they say, the words "we" and "our" in Mr. V'Soske's letter of November 29, 1963—which he signed as President on behalf of the corporation—were meant to refer to the individual respondents who were the stockholders. Of course, these are nothing more than the words normally used in business correspondence when referring to a corporation. The corporation is clearly meant, for instance, when the letter refers to "our Irish affiliate", "our inventories", "our books" and finally "if you want to buy us". (Ex. P-3; 25a-26a)

No one would dispute respondents' contention that the requirement of identifying the parties is satisfied when both parties sign the correspondence. The plain fact is, however, that the stockholders, who claim to be the contracting parties, never signed the correspondence in this case and there was no proof or even allegation at the trial that Mr. V'Soske "was acting as spokesman for the individual respondents" or had authority to sign for them. (14)

The contract which the individual respondents sued on was simply not the contract which the Court of Appeals found from the correspondence nor is such contract contained in any writing signed by the individual respondents.

CONCLUSION

We, therefore, respectfully request that the petition for writ of certiorari be granted.

RICHARD JOYCE SMITH,
Counsel for Petitioner.

PATRICK H. SULLIVAN,
FORBES D. SHAW,
JOHN V. THORNTON,
T. DAVID MULLEN,

WHITMAN, RANSOM & COULSON
Of Counsel.

March 4, 1969